IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 480

LARRY AARON HOWZE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
Los Angeles 12, California
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-5600

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. _____

LARRY AARON HOWZE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1970; Petition for Rehearing denied July 2, 1970. See Appendix B to this Petition.

The Petition for Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Is the Act unconstitutional because, as construed and applied,

(1) The civilian work which appellant was ordered to perform was inappropriate in that it involved elements contrary to his religion, and therefor contrary to the First Amendment, or

(2) Because it is designed to supply men for an undeclared war, and not for an army of defense in violation of Article I, Section 7 of the Constitution, or because

(3) It calls for a private non-federal labor draft for the performance of services that are not exceptional or

related to the national defense, in violation of the Thirteenth Amendment to the United States Constitution?

This was raised by Motion for Judgment of Acquittal [CT 19].*

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment, Article I, Section 8 of the Constitution and the Thirteenth Amendment. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged Petitioner with a violation of the Universal Military Training and Service Act: refusing to do civilian work, as ordered [CT 2).

He pleaded "not guilty" and was tried by the Honorable Albert Lee Stephens, Jr., District Judge, sitting alone without a jury. He was found guilty and sentenced.

6. THE FACTS

The relevant facts in this petition are found in (1) the Petitioner's Selective Service System file [Ex.]** and in (2) the reporter's transcript of proceedings of the trial [RT]*** both being parts of the designated record on appeal.

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*CT refers to Clerk's Transcript.

**Ex. refers to the government Exhibit, the complete SS file of Appellant.

***RT refers to the Reporter's Transcript of Proceedings of the trial.

Petitioner registered with Local Board No. 77, Bakersfield, California on June 29, 1962 [Ex. 2]. He claimed conscientious objections to war and was sent by the Local Board SSS Form 150, which he returned, stating that he had been raised as one of Jehovah's Witnesses and that he had obtained most of his religious training from his parents [Ex. 43-36]. On February 3, 1967, he was classified I-O and so notified [Ex. 11].

On June 2, 1967 petitioner appeared before Local Board to discuss his classification and his civilian work assignment [Ex. 66-68].

On August 15, 1967 the Local Board sent him an Order to Report for Civilian Work and Statement of Employer, ordering him to report to the Local Board on August 28, 1967 for further instructions to proceed to the Los Angeles County Department of Hospitals [Ex. 74].

Petitioner reported to the Department of Hospitals but refused the work assignment [Ex. 74]. His reason was that the work was contrary to his religious beliefs [RT 34-35].

7. REASONS FOR GRANTING A WRIT

The questions presented are of an importance greater than one individual's fate. The questions are national because the reach of the Selective Service System is into every hamlet, the "calls" for induction show every indication of continuing, and the percentage of registrants professing conscientious objections to war is not decreasing, therefore numerically many persons are affected.

The constitutional points presented are of grave importance and wide impact.

8. ARGUMENT

I

The Civilian Work Which Appellant Was Ordered to Perform Was Inappropriate in That It Involved Elements Contrary to His Religion

Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest the Appellant was assigned to perform such work at the Los Angeles County Department of Hospitals [Ex. 74].

Appellant so reported on the assigned date, August 28, 1967, but refused to perform the work [Ex. 74].

Appellant is one of Jehovah's Witnesses. His sincerity in regards to conscientious objection was accepted by the Selective Service System and he was so classified. It is well known that Jehovah's Witnesses will not work at any job involving handling blood since it is contrary to their religious beliefs. *Langhorne* v. *United States*, 9 Cir., 394 F.2d 129 (1968). The law provides that work assigned shall be "appropriate," [32 C.F.R. § 1660.1]. It also must be suitable. *Johnson* v. *United States*, 9 Cir. (1960), 285 F.2d 700.

Work religiously objectionable has been held unsuitable for the alternate service contemplated by Congress.

In *United States* v. *Copeland*, 126 F. Supp. 734 (1954), it was held that work that adversely affected the religious beliefs of a registrant was inappropriate.

In *United States of America* v. *George Donald Sparks*, Criminal No. IP-54-CR-30 decided by Honorable William E. Steckler, district judge, Southern District of Indiana,

Indianapolis Division on February 11, 1955, the court held that the work to which Sparks had been ordered "clashed with those of the sectarian principles of the defendant" and therefore acquitted him.

At the trial of Petitioner Howze it was established why he refused to work at the Hospital:

> "Q. Well, are you willing to handle blood in any manner?
>
> A. No, I am not.
>
> Q. Why is that?
>
> A. It is against our religion, the way I have been raised, to handle blood or to give transfusions or to take transfusions." [RT 34].
>
> * * *
>
> Q. Do you know if the job involved handling blood?
>
> A. Yes.
>
> The Court: Did you know in advance?
>
> The Witness: Yes.
>
> The Court: How did you find out?
>
> The Witness: Any hospital handles blood.
>
> The Court: There are lots of jobs in a hospital that don't handle blood.
>
> The Witness: They didn't state to me any specific job that I would be doing at the hospital or any thing." [RT 35].

Thus the reason why the Petitioner refused the work assignment is clear.

Knowing that the Petitioner is one of Jehovah's Witnesses, and understanding what they believe, it is clear that the civilian work to which he was ordered to perform was inappropriate in that it involved elements contrary to his religion. Thus it is contended that the order to report for that particular work assignment was invalid, with respect to him, and no conviction upon it should be upheld.

II

The Conscription of Men, and for an Undeclared War, Violates Article I, Section 8 of the Constitution

Initially, it is reasonably certain that it was not the intent of the founding fathers, the formulators of the Constitution, to include conscription in the use of congressional power to raise armies.

It is historically accepted that all the colonial statesmen were familiar with the attacks on liberty made by the armies of Cromwell, Charles II and James II. As John Trenchard's famous essay of 1697, *An Argument, Shewing, that a Standing Army is Inconsistent with a Free Government,* explained: "unhappy nations have lost that precious jewel *liberty* . . . [when] their necessities or discretions have permitted a standing army to be kept amongst them." (at p. 11) The behavior of British troops in America during the ten years before the Revolution confirmed the Colonists' worst fears of this danger. When British troops landed in Boston in 1768 Andrew Eliot, a leading statesman, wrote: "To have a standing army! . . . Good God. What can be worse to a people who have tasted the sweets of liberty!" (Bailyn, *The Intellectual Origins of the American Revolution,* 114 (1967)) The Boston Massacre of 1770 and the Quartering Act in 1774 permitting the seizure of all buildings for the use of British troops showed the Colonists how accurate Trenchard and Eliot had been. The Declaration of Independence specifically complained that George III "[h]as kept among us, in times of peace, standing armies without the consent of our legislature," and "has effected to render the military independent of and superior to the civil power."

The Continental Congress imposed strict control over its own army organized to fight the Revolutionary War.

Marcus Cunliffe, the distinguished English historian, has recently written:

> "The Continental Congress and the Majority of Americans were sometimes more concerned with the danger of military overlordship than the danger of military inefficiency. From a combination of doctrine and habit, they were reluctant to create their own version of a standing army." *Soldiers and Civilians*, 40-41 (1968).

As a result, Congress insisted on regular reports from its commanding officer, George Washington, appointed his staff officers and obliged him to consult with his generals in council before any major military decision was made. See Weigley, *History of the United States Army*, 30 (1967). Even in the midst of the war, Connecticut proposed that no peacetime army should be allowed. See Cunliffe, op. cit., 41.

Furthermore, Congress was never given any power to conscript soldiers directly into the Continental ranks. It had to rely on the militia forces of the various states for the bulk of its fighting men. In June, 1775 Congress permitted the enlistment of ten companies into the Continental Army to help New England militia forces around Boston. Although Congress later authorized increased musters, enlistments, which ran generally for one year, always fell far below expectations. Short term enlistments seemed an unnecessary leniency in the face of the national emergency, but Prof. Weigley points out:

> "The one year enlistments of 1776 were a grave handicap . . . .but the basic cause of that policy was not Congressional folly but the caution necessary in creating a professional army among a people who had fled Europe partly to escape such armies." (at 38).

Although we have dealt with this threshold sub-point lightly we pass on to the essential element of the point

we urge, namely that there is no constitutional power to conscript armies. We deal with this matter in two parts: A. The decisions on this subject, upholding conscription, are incorrect; B. The clear intent of the framers of the Constitution must govern.

A. This Court's decision upholding conscription should be considered a derelict.

This Court has decided only war-time conscription. *Arver* v. *United States*, 245 U.S. 36 (Jan. 7, 1918).

1. Arver was decided incorrectly.

The Arver decision has been criticized in many quarters.

The Second Circuit in *U. S.* v. *Jakobson*, No. 28137, decided Nov. 22, 1963, ... F.2d ....., said: "The constitutionality of this provision under the First Amendment was upheld, rather summarily, in Arver v. United States, 245 U.S. 366, 389-90 (1918).

Professor Philip B. Kurland, in Religion and the Law, Aldine, 1962—

> "Mr. Justice White's opinion for a unanimous Court, rendered during the height of the American participation in World War I disposed of the issue quickly, but without authority or reason. 'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.'[90] The decision is as sound as the reasons given for it." [37-38].

* * *

"Were it not for the Selective Draft cases [Arver, supra], it should be clear that exemption from military obligations in terms of religious affiliation is unconstitutional.[64] If military service be considered a duty of every qualified citizen, exemption grants a benefit to religious adherents because they are religious adherents, a result banned by the separation clause. There should be little doubt, for example, that the Government could not refuse commissions in the military service to all members of specified religious sects. It can no more grant benefits on that ground than it can deny them unless the wall of separation is again to be breached. Cardozo's reference to Davis v. Beason[110] suggested that the high wall was to be maintained." [40-41].

Harrop A. Freeman, Professor Law at Cornell University writing in 31 Virginia Law Review 40, at page 56 says—

"There are some who find in the court's opinion the attitude which Shakespeare made famous in the words: 'The lady doth protest too much, methinks.' For the court's argument is constantly advanced by this type of wording: 'cannot conceive', 'too frivolous for further notice', 'so devoid of foundation', 'not even a shadow of ground', 'to do more than state the proposition is absolutely unnecessary', 'unnecessary to follow', 'wholly unnecessary to explore', 'cannot be the slightest doubt', 'it is indisputable', 'fallacy of the argument', etc."

Minnesota Law Review 36:1

"The Selective Draft Law Cases decided, in a single cursory sentence,[64] that the 'well-recognized

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64—245 U.S. 366, 389 (1917): "And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."

sect' provision of the World War I Act was not an establishment of religion." [72]

2. Peace-time conscription is unconstitutional.

The importance of our point needs no comment. The validity of our contention is based, in brief, on the following: it is a matter for judicial determination, not legislative.

The court's decision in *United States* v. *Macintosh*, 283 U.S. 605 (1931), is illuminating in our problem. The majority opinion made clear it was considering the validity of conscription in connection with "time of war" [623]. The minority opinion, by Chief Justice Hughes [which became the Court's subsequent view in *Girouard* v. *United States*, 66 S. Ct. 826 (1946), and *Cohnstadt* v. *Immigration*, etc., 70 S. Ct. 516 (1950)], is notable, incidentally, for furnishing the verbal basis for the "Supreme Being Clause" in the current Act [page 674, of the dissent] and for the following, which we use as the justification for our argument:

> "The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience." [634].

A Cornell Professor, Harrop A. Freeman, has strongly challenged the constitutionality of peace-time conscription in 31 Virginia Law Review 40 (1944). His challenge need not be repeated here for we obviously need not take on the burden of challenging the entire law. Our task is much more limited.

There is no doubt we live in a troubled time. This has been said throughout all history, by many administrators and legislators, and with equal right.

Our civilian economy today does not have emergency need for hospital labor.[1] Is a civilian labor draft required? If it be argued that Congress, by enacting a civilian labor draft has so found, then appellant urges it is the duty of the courts to declare otherwise. It is evident thousands are today engaged in putting more chrome and bigger dorsal and pectoral fins on automobiles. The point need not be belabored. While it is conceded that hospital work is essential, and that work in this field helps the national welfare, where is the proof of an emergency requiring a labor draft?

The prior Acts were clearly emergency laws:

(1). Act of February 28, 1795:

> "That whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia," etc.

(2). Draft Act of March 3, 1863:

> "Whereas there now exists in the United States an insurrection and rebellion against the authority thereof, and it is, under the Constitution of the United States, the duty of the Government to suppress insurrection and rebellion," etc.

In *Martin v. Mott*, 12 Wheat. 33, it was held the act of February 28, 1795, was valid, on the ground that act authorized the President, in cases of invasion, etc., to call

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1. Petitioner was indicted for refusing to work, as ordered, in a hospital (R. p. 3).

forth the militia. And the same is the major rationale of the Civil War cases.

(3). The 1917 law was a temporary war-time measure, the opinion itself commencing:

> "Mr. Chief Justice White delivered the opinion of the court.
>
> "We are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, c. 15, 40 Stat. 76), entitled 'An act to authorize the President to increase temporarily the military establishment of the United States.' The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant." [160]

(4) The 1940 Act was explicitly labelled an emergency measure:

> "The Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States."
>
> 50 U.S.C.A., Appendix, § 301 (a).

(5). Our current law, the Military Selective Service Act of 1967, Section 1 (b), concentrated on training and declared no emergency:

> "(b) The Congress hereby declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation."

It is evident that in the current law Congress did not even attempt to make it an emergency measure, nor to declare "it is imperative to increase" the personnel of the armed forces, the expression it had chosen in 1940.

B. The clear intent of the Constitution must govern.

This rule was early enunciated:

> "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex Parte Bain*, 121 U.S. 1, 12 (1887).

This rule was recently held viable:

> "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historical experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed?" *Dennis* v. *United States*, 341 U.S. 494, 523 (1951) (Frankfurter, Jr., concurring).

Even more recently, in *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the Supreme Court held unconstitutional an Ohio law restricting the right of third parties to have their name placed on the ballot in presidential elections. Justice Harlan, in his concurring opinion, has stated most forcefully that the original understanding of the Constitution-makers must not be mitigated where it was intended to protect the people against arbitrary or unwarranted assertions of legislative power.

> "When one looks beyond the language of Article 2, and considers the Convention's understanding of the College, Ohio's restrictive approach is seen to undermine what the draftsmen understood to be its very essence. The College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large. If a State declares that an entire

class of citizens is ineligible for the position of Elector, and that class is defined in a way in which individual merit plays no part, it strikes at the very basis of the College as it was originally conceived.

"The constitutional grant of power to the States was intended for a different purpose." *Ibid.*, at 43-44. (Footnote omitted.)

The intent of the Constitution-makers governs the interpretation of constitutional provisions. Specific powers enumerated in the Constitution "cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." *United States* v. *Robel*, 389 U.S. 258, 263 (1967). The Framers intended to exclude the power to conscript into the national armed forces from the power to raise and support armies.

We conclude, therefore, that serious questions of constitutionality are presented.

CONCLUSION

For the reasons given the petition should be granted.

Respectfully,

J. B. TIETZ
410 Douglas Building
Los Angeles 12, California
Attorney for Petitioner

July 31, 1970

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LARRY AARON HOWZE,
Appellant.

No. 24,313

[March 25, 1970]

On Appeal from the United States District Court for the Central District of California

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Before: CHAMBERS, ELY and TRASK, Circuit Judges.

PER CURIAM:

The judgment of conviction is affirmed.

The draft board gave Howze a I-O, conscientious objector classification. He declined as a Jehovah's Witness to make a selection among three choices of work offered him in civilian employment. So the local board ordered him to work at a local hospital. There he declined to work.

Perhaps he could have made a case before the board for other civilian work, but he didn't attempt it. Further, he failed to show that the hospital work would have necessarily required him to handle blood, against which he asserts an aversion.

Howze further claims that he should have had a II-C deferment as a farmer. He did not pretend to show the board that others were not available to do his farm work, one of the requirements for this type of deferment.

The point that the board failed to reopen the file to consider his classification is without merit. He tendered to the board at no time a prima facie case for deferment, and no new facts developed after classification that were not available to him to present when he first sought the occupational deferment. This last point is governed by Petrie v. United States, 9 Cir., 407 F.2d 267.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY AARON HOWZE,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 24,313

(Filed July 2, 1970)

Order Denying Petition for Rehearing

Before: CHAMBERS, ELY and TRASK, Circuit Judges.

The petition for rehearing is denied.

APPENDIX C

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution, Art. I, § 8

"The Congress shall have the power . . . .

* * *

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;"

* * *

Amendment 13

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

* * *